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Felony Disenfranchisement: A Literature Review

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In this paper we examine the literature on felon disenfranchisement laws. We summarize studies of the history, statistical determinants, and constitutional status of these laws. We look at the impacts of these laws on voter turnout, partisan politics and public policy formation. In the process of our analysis, we tease out the pros and cons over these laws. We see the debate over felon disenfranchisement as part of the larger debate over the issues of voter suppression and the future of democracy in the United States.

On one side of the debate are scholars who see these laws as normal and unproblematic. Within their perspective, these laws are race neutral and have historical roots extending back to ancient and medieval times. Some of these scholars claim that these laws are consistent with enlightenment democratic theory, well grounded in English Common Law, and solidly supported by the United States Constitution. They insist that the authors of the 14th amendment supported and promoted these laws precisely because they are applied equally to all citizens and maintain the purity and integrity of the voting process. They argue that if these laws have a disproportionate impact on racial groups in the United States, this impact is unintentional and can best be explained by members of these groups having higher incidents of committing felonies. In a *Wall Street Journal* editorial written in response to Attorney General Eric Holder's criticism of these laws, Jason Riley summaries this defensive perspective:

> Blacks are disproportionately affected by felon disenfranchisement laws because a disproportionate number of blacks are felons. The problem is black criminality, not racist laws. White felons face the same voting restrictions, which date not to America's post-Civil War period, as Mr. Holder suggested in his remarks, but to medieval Europe by way of ancient Greece and Rome. Indeed, many of the voter-disenfranchisement laws in this country were passed long before blacks could even vote. "From 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or permitted their statutory disenfranchisements," explained George Brooks in a Fordham Urban Law Journal article. "That African-Americans are disproportionately disenfranchised is a matter of grave concern, but it is a side effect of high crime rates. It flows from their status as felons, not from their race (Riley 2014)."

On the other side of the debate, a number of scholars offer an alternative and more critical perspective. They see these laws as not only problematic, but undergirded by profound and persisting racial biases. They argue that these biases are evident in historical, statistical, and constitutional analyses. They demonstrate that these laws became more restrictive during periods of increasing racial repression, became more expansive and punitive during the post-Reconstruction era, and were part of systematic and deliberate efforts to disenfranchise African Americans. They show that these laws are statistically associated with racial fears. Critical constitutional scholars claim that the authors of the 14th and 15th amendments would be appalled by these laws. These scholars conclude that the United States is unique among developed democratic nations in the world: "Nowhere else are millions of offenders who are not in prison

denied the right to vote (Manza and Uggen 2006, 41)." Moreover, the United States incarcerates and disenfranchises a much larger proportion of its racial minority population than any other nation in the world.

In this paper, we weigh in on this debate. We believe that the preponderance of the evidence supports the view that felon disenfranchisement laws are racially biased and inconsistent with liberal democratic theory. We examine the felon disenfranchisement literature from these perspectives: historical, statistical, constitutional, and political.

Historical

Felon disenfranchisement laws have a long history. This history can be divided into five major eras: Pre-Revolutionary age (ancient times, up to the American Revolution), Revolutionary and Jacksonian period (1776-1865), Post-Civil War phase (1865-1965), Civil Rights era (1965-2000), and the current time (2000-today).

Pre-Revolutionary Age

The pre-Revolutionary periods includes ancient, medieval and colonial times. Most historical studies trace the origin of felon disenfranchisement laws back to Greek and Roman times, although democracy was rare in the ancient world and restricted wherever it existed, as slaves, women, and non-citizens were excluded from the polis in these societies. Democracy was considered a bad form of government. Ancient philosophers saw democracy as mob rule. Plato insisted that democratic societies deteriorated into anarchy which gives rise to tyranny. Aristotle saw democracy as a rule by people of low birth, no property and vulgar employment. Although ancient Athens was considered a democracy, slaves and property-less citizens were excluded from the polis, and free speech was not tolerated, as the execution of Socrates demonstrated. In Greek society, *atimia* was imposed on criminal offenders. That is, citizens lost all citizenship rights, including the right to vote. Roman society imposed *infamia,* which involved a range of penalties (loss of reputation, loss of the privilege of serving in the Roman Legion, or loss of the right to participate in the polis, including the right to vote). The penalty depended on the seriousness of the crime and the social class of the offender (Manza and Uggen 2004, 23).

Medieval society involved a legal measure much more extreme than just felon disenfranchisement, the legal doctrine of "civil death." Civil death entailed the loss of all citizenship rights: the right to participate in civil society, to sit on juries, to sue others, to testify in court, to enter into contracts, to purchase property, or to speak in public. Civil death required the forfeiture of property as well as the loss of the right to vote. The problem with felon disenfranchisement in both ancient and medieval societies is that these societies were never known for promoting democracy. Greek societies were ruled by tyrants or kings, Roman society by Caesars, and medieval societies by monarchs and aristocrats. Where democracy existed in the ancient world, it was for the privileged few. Undesirable people of low birth, no property, vulgar employment, bad reputation or infamous character were excluded from the polis.

English Common Law and Colonies

The ancient and medieval customs of limiting membership in the polis to privileged males continued under English common law. Neither English nor Colonial law recognized

voting as a right of citizenship. The right to vote was limited to property owning males. The Colonies had felon disenfranchisement laws. However, these laws were vague, often moral and narrowly defined. For example, Maryland disenfranchised anyone guilty of public drunkenness. Massachusetts disenfranchised people guilty of "shameful and vitious crimes" (Manza and Uggen 2004, 24).

Revolution and Jacksonian Era

Most Americans see the American Revolution as an exceptional historical moment that advanced humanity toward liberty, equality and democracy. Conventional wisdom insists that democracy was not born fully developed in the United States. Rather, initially, the right to vote was restricted to the property owning class. However, conventional wisdom maintains that the whole history of the vote and democracy in the United States is a history of linear progress, of increasing democracy, of gradual expansion of the right to vote to previously excluded groups: first to property-less white males, then to black males and finally to women.

The extension of the right to vote to property-less white males was a long and gradual process. State governments began to remove these restrictions in the early 19th century. This process accelerated during the Jacksonian era. The Jacksonian era, from the 1820s to the 1860s, is known for the expansion of democracy and equality and for the eclipse of the practice of showing deference to the rich, the educated, and the privileged disappeared. Moreover, state governments eliminated property owning and tax-paying requirements for voting. The right to vote expanded to white males.

Felon disenfranchisement is part of the story of the expansion of the right to vote. These laws increased as the right to vote expanded. As noted above, between 1776 and 1821, eleven states adopted constitutions that disenfranchised felons or allowed state legislatures to pass laws disenfranchising felons. Because felon disenfranchisement laws expanded during the same period in which the right to vote was extended to white males, defenders of these laws see them as associated with democracy and unrelated to racial prejudices. Jason Riley adds, "Indeed, many of the voter-disenfranchisement laws in this country were passed long before blacks could even vote (Riley 2014)."

An alternative, less popular, but more critical view suggests that there were competing political factions inside the American Revolution. According to this view, while there were many leaders that promoted the ideas of liberty, equality and democracy, the dominant leaders were major property and slave owners who opposed democracy, who feared the masses, and who saw the Revolution as a movement against a colonial master that imposed unfair taxes to pay for French and Indian War without representation. Moreover, this property/slave owning class saw England as unenthusiastic about slavery and adamantly opposed to their expansion westward into Native American territory (Aziz). Whereas some leaders like Benjamin Franklin, Thomas Paine and Ethan Allen favored extending the right to vote to all males, black and white, rich and poor, most leaders including James Madison, John Adams, John Jay, and many others insisted on limiting the right to vote to property owners (Keyssar 2000). Because of the intensity of this debate, the authors of the Constitution shifted the responsibility of deciding the qualifications for voting to the state legislatures. Most states restricted the right to vote to property owning, tax-paying males.

According to this narrative, the right to vote was not extended to white males because of the growth of democratic ideas or mass protest. Rather the privileged property and slave owning

classes extended the right to vote to the property-less white males for a number of pragmatic reasons. First, white males were needed to settle new Western territory. New states offered them the right to vote to attract them to help populate the area.

Second, property-less white males were needed in the military to fight wars with other countries, to subjugate Native Americans, and to suppress slave revolts. It was easier for the privileged class to persuade property-less white males to shed their blood, risk their lives and limbs serving in the military by making them part of the polis. Privileged, property owning white males extended the right to vote to property-less white males as part of a grand bargain. In exchange for the right to vote, the property-less were enlisted to fight wars against Britain (1812), Mexico (1848), and Native Americans.

Most importantly, property-less white males were needed to suppress slave revolts and control slave populations. This need explains the contradiction of state legislatures extending the right to vote to white males while taking away this right from black males. Slave revolts of the 1820s and 1830s heighten fears of blacks. These fears were associated with the rise of anti-black laws. During the 1830s, 40s and 50s, a number of Southern states passed laws barring free blacks from residing inside their boundaries. A number of Northern states passed laws requiring blacks to pay a bounty or fee in order to reside in the state. These bounties ranged from $500 to $1,000. Some states like Oregon barred blacks from owning real estate, entering into contracts, or testifying in court.

Felon disenfranchisement laws became more expansive and restrictive as state governments became more racially repressive. This repression was most evident between 1830 and 1865. In the early years of the Republic states, blacks were less repressed and felon disenfranchisement laws were less restrictive. From 1776 to 1790, most states allowed free black males to vote. "In 1790, only 3 of the 13 states excluded nonwhites from voting…(Manza and Uggen 2008, 53)." During this same period, felon disenfranchisement laws were restrictive. As noted above, Maryland denied the vote to those guilt of public drunkenness, Massachusetts for those guilty of shameful and vitious crimes. In 1819, Alabama denied the vote to "any person who may be convicted of bribery, forgery, perjury, or any other high crime or misdemeanor Manza and Uggen 2008)"

These early laws were narrow compared to more modern laws enacted after 1830. Disenfranchising people for bribery or perjury convictions is fundamentally different from disenfranchising people for theft, breaking and entry, armed robbery, embezzlement, forgery, drug possession, assault, murder or other felonies. The former is narrow and impacts a small number of cases. The latter is much broader and impacts a much larger population.

After 1830, states became more racially repressive and felon disenfranchisement laws more restrictive. "By 1840, 20 of the then 26 states had removed nonwhites from the rolls, either by directly specifying that African Americans could not vote or by indirectly disenfranchising them through the implementation of onerous property requirements applicable only to African Americans (as in New York) (Manza Uggen 2008, 53)." As states eliminated property owning as a condition for white males to vote, states imposed severe restrictions of the voting rights of non-whites:

> Of equal importance, every state that entered the union after 1819 prohibited blacks from voting. In the late 1840s and early 1850s, moreover, many states (including New York, Ohio, Indiana and Wisconsin) reaffirmed their racial exclusions, either in constitutional conventions or through popular referenda. By 1855, only five states (Massachusetts,

> Vermont, New Hampshire, Maine, and Rhode Island) did not discriminate against African Americans, and these states contained only 4 percent of the nation's free black population. Notably, the federal government also prohibited blacks from voting in the territories it controlled; in 1857, the Supreme Court ruled that blacks, free or slave, could not be citizens of the United States Keyssar 2000, 55).

As racial prejudices and proslavery sentiments rose, the movement to disenfranchise blacks intensified. Anti-black attitudes and support for more expansive and restrictive felon disenfranchisement tended to coincided. The racist mind saw blacks as part of the criminal element. Manza and Uggen illustrate this point with quotes from New York political leaders arguing for laws to bar blacks from voting:

> The minds of blacks are not competent to vote. They are too degraded to estimate the value, or exercise with fidelity and discretion this important right…Look to your jails and penitentiaries. By whom are they filled? By the very race it is now proposed to clothe with the power of deciding upon your political rights (Manza and Uggen 2008, 42).

Manza and Uggen identified 14 states that established more modern felon disenfranchisement laws, either by expanding existing laws or establishing newer, more onerous laws.
See Table 1.

Table 1
States Expanding Felon Disenfranchisement Laws

State	Year	State	Year
Virginia	1830	Minnesota	1857
Ohio	1835	Indiana	1852
Louisiana	1845	Oregon	1859
Iowa	1846	Pennsylvania	1860
New York	1847	Nevada	1864
Kansas	1859		
Wisconsin	1846		
California	1849		
Kentucky	1851		

From 1830 to 1865, as white males gained the right to vote, black males lost this right either directly through state laws that explicitly barred blacks from voting or state laws that restricted the black vote to only a few capable of owning property or paying an extremely high bounty in order to vote. At the same time that these states passed these racially restrictive laws, they also passed more expansive modern felon disenfranchising laws. Thus, according to this perspective, the expansion of felon disenfranchisement laws were part a larger movement to disenfranchise black voters.

The Reconstruction and Redeemer Period

During the Reconstruction period (1865-1876) and after the ratification of the 14th and 15th amendments, the right to vote was extended to black males. Some states repealed their felon disenfranchising laws. Blacks voted. Many were elected to state legislatures and to congress. Two were elected to the U.S. Senate.

After 1876, racial repression reemerged with a vengeance during the Redeemer period. The Southern landed aristocracy campaigned violently and relentlessly to disenfranchise blacks and to regain their dominant political position in both Southern and national politics (Foner and DuBois). By the beginning of the 20th century, most blacks had lost the right to vote, despite the 15th amendment. Felon disenfranchise laws proliferated during this period. As new states joined the union, they too disenfranchised felons. Between 1865 and 1900 "19 states adopted or amended laws restricting the voting rights of criminal offenders (Manza and Uggen 2008, 55)."

Racial bias played a role in the construction of Post-Reconstruction felon disenfranchisement laws. When compiling their list of felonies punishable by the loss of the right to vote, many state legislators including felonies that they believed were most likely committed by blacks and excluded from this list, crimes they believed were most likely committed by whites. Typically, states excluded fighting and murder from the list of disenfranchising laws because these crimes were more like committed by whites; but included adultery, wife-beating, thievery, chicken stealing, house breaking and other crimes deemed more likely committed by blacks:

> Similarly, South Carolina restricted the right to vote in dealing with crimes that were more likely committed by an African American such as "thievery…adultery [and] house breaking." However, crimes more likely to be committed by a white American as opposed to an African American like "murder and fighting," did not result in disenfranchisement (Spears 2014, 94).

Alabama law makers added "moral turpitude" and "wife-beating" to their list of infractions, but excluded fighting and murder because they believed these crimes were more likely committed by whites than by blacks. We know that this was the deliberate intent of this law, because the author expressed this intent in clear language: "John Fielding Burns, the sponsor of the new disfranchisement bill boasted that "the crime of wife-beating alone would disqualify sixty percent of the Negroes (Manza and Uggen 2008, 58)." Moreover, this state banned all felons and ex-felons from voting, permanently. A few states included the crime of miscegenation on this list.

It is no coincidence that more expansive and onerous felon disenfranchisement laws were enacted around the same time states were enacting poll tax, literacy test, character test, and grandfather clause laws. These laws were motivated by a bias against blacks and were designed to circumvent the 15th amendment. An 1896 Mississippi Supreme Court decision illustrates this point. The court not only expressed the common prejudice of black criminality, it acknowledged that Mississippi law makers expanded felon disenfranchisement laws in order to circumvent the 15th amendment and disenfranchise blacks:

> Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit of

> temperament, and of character, which clearly distinguishes it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits without forethought and its criminal members given rather to furtive offenses than to the robust crimes of whites. Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaken members were prone.

In other words, the court acknowledged that state legislatures passed these laws to disenfranchise blacks without running afoul of the 15th amendment. The court also expressed the common prejudice that blacks were criminally prone. This prejudice was common among public officials of this era:

> Racial stereotyping about criminality has been pervasive. Theodore Roosevelt, expressing widely held views in the Progressive era, called for "relentless and unceasing warfare against law breaking black men" on the ground that "laziness and shiftlessness…and above all, vice and criminality of every kind, are evils more potent for harm to the black race than all acts of oppression of white men put together (Manza and Uggen 2008, 47).

The racial stereotype of black criminality was also prevalent in academic literature. In the early 20th century, the discipline of criminology associated criminal behavior with subordinate racial and ethnic groups:

> The ascription of criminal traits to subordinate racial and ethnic groups also defined the early history of criminology. For example, Cesare Lombroso and other early criminologists made reference to "criminal races (Manza and Uggen 2008, 47)."

Statistical Determinants of History of Felon Disenfranchisement

This alternative history of felon disenfranchisement proposes a testable hypothesis: The hypothesis is that the emergence of felon disenfranchisement has nothing to do with race or racial prejudices. To test this and the alternative hypothesis, Manza and Uggens use a complex, event history, multivariate, statistical analysis of the determinants of felon disenfranchisement. They identify four levels of their dependent variable, felon disenfranchisement:

1) Disenfranchisement only while incarcerated.
2) Disenfranchisement while incarcerated and while on parole
3) Disenfranchisement for the length of the sentence, until completion of probation, parole, and incarceration)
4) Disenfranchisement after completion of sentence (ex-felon). (Manza and Uggen 2008, 64).

They rely on racial (or ethnic) threat theory in developing their independent variables. This theory assumes that felon disenfranchisement laws would expand and become more restrictive as perceptions of racial threats increase. Manza and Uggen use three indicators of racial threats: the percentage of the population that is non-white, the percentage of the state prison population that

is non-white and the percentage of the white male population 15-39 that is idle, unemployed and not in school. They include alternative determinants of felon disenfranchisement laws such as partisanship, region, time period, and date of statehood. They used three time periods: prior to 1870, 1870-1960, and 1960 to the present.

The results of their analysis disconfirms the view that felon disenfranchisement laws have nothing to do with race. Their data demonstrate that the association between felon disenfranchisement laws and their racial threat indicators--percentage of non-white population, percentage of non-white prison population, and percentage of white 15 to 39 idle—is strong and statistically significant. Although felon disenfranchisement laws were most restrictive in the South and West, the effect of region disappeared in their multivariate regression analysis that controlled for region. They also found that time period mattered. They conclude:

> As expected, racial threat has more pronounced and consistent effects in the post-1870 period. That the nonwhite prison population remains a strong predictor in the earlier period is perhaps not surprising in models predicting felon disenfranchisement, because the racial composition of state prisons likely represents the most proximal measure of racial threat. Racial challenges to political power were much more visible during and after Reconstruction, but it is important to note that they predated 1870 (Manza and Uggen 2008, 66-67).

State legislatures could not disenfranchise blacks explicitly because of race. The 15th amendment prohibited overt racial exclusion from the voting booths. In order to circumvent the 15th amendment state governments used a number of seemingly race neutral devices, including the literacy tests, poll taxes, character tests, and grandfather clause. Felon disenfranchisement laws emerged after 1870s and joined this list of race neutral devices bar blacks from the polls.

From Civil Rights to Today

The Civil Rights Movement along with the Voting Rights Act of 1965 and the 24th amendment ended the two most effective race neutral devices for disenfranchising blacks: the literacy test and the poll tax. The overwhelming majority of blacks gained the right to vote. Felon disenfranchisement had not been a major issue. It became an issue by the 2000 election. Three factors made it an issue: the U.S. Civil Rights Commission report on the 2000 election, the exponential increase in the incarceration rate, and the recent changes in these laws, making them even more punitive and restrictive.

The 2000 Election

Florida decided the outcome of the 2000 election, or rather the U.S. Supreme Court allowed the last vote count to decide the election. Aside from the controversy of this court decision, a report by the U.S. Civil Rights Commission, Irregularities in Florida raised the visibility of the felon disenfranchisement controversy. Whereas this report found several irregularities—Florida State Police setting up roadblocks on streets leading to voting places, votes lost, ballots spoiled, voting places closing early—felon disenfranchisement laws constituted a special and serious problem.

These laws were used like the old literacy test, which disenfranchise blacks who could read and write. That is, Florida's laws disenfranchised blacks who had never been arrested, never charged with a crime or never had a felony conviction. Florida accomplished this feat through the process of scrubbing its voting rolls—eliminating for the list of registered voters people who had not voted for several elections, people who were deceased, and people with felony convictions. The Florida Secretary of State Office contracted with a private firm. The firm developed a list of the names of people with felony convictions in Florida and several other states. All of the names on the voter registration list that matched the names on the list of convicted felons were purged without verifying whether to registered voter actually had a felony conviction. Consequently, thousands of people without a felony conviction were purged from the voter registration rolls and denied the right to vote. Legitimately registered voters with no felony record who were purged from the rolls were never notified that they were de-registered. Also, a large percentage of those purged were black. The report adds, "For instance, in the state's largest county, Miami-Dade, more than 65 percent of the names on the purge list were African American, who represented only 20.4 percent of the population (U.S. Civil Rights Commission 2001)."

Felon disenfranchisement laws emerged as a special and serious problem because of the sheer number and proportion of people who lost the right to vote. This problem was exacerbated by the exponential increase in the number of people with felony convictions, producing an incarceration crisis.

Exponential Increase in Prison Populations

According to data gather by the Sentencing Project, the number of people incarcerate in state and federal prisons in United States was around 100,000 in the 1920s. This population fluctuated around 200,000 throughout the 1960s and early 1970s. By 1980 this population had reached 319, 598 (see table 2). It increased geometrically throughout the next three decades and peaked in 2010 at 1,521,414.

Table 2
Number of Persons under Correctional Supervision
1980-2011

Year	Probation	Jail	Prison	Parole	Total
1980	1,118,097	183,988	319,598	220,438	1,842,100
1985	1,968,712	256,615	487,593	300,203	3,013,100
1990	2,670,234	405,320	743,382	531,407	4,350,300
1995	3,077,861	507,044	1,078,542	679,421	5,342,900
2000	3,839,532	621,149	1,316,333	725,527	6,460,000
2005	4,162,495	747,529	1,447,942	784,354	7,050,900
2010	4,055.514	748,728	1,521,414	840,676	7,079,500
2011	3,971,319	735,601	1,504,150	853,852	6,977,700

The magnitude of the U.S. incarceration rate becomes more apparent when presented in comparative perspective. Table 3 compares the U.S. rate with the rates of select countries based on 2013 data. The U.S. has the highest incarceration rate in the world. Its rate per 100,000, which accounts for population is over six times the Canadian rate and close to five times the British rate and almost double the Russian rate. Whereas U.S. political leaders often condemn

Cuba and China for having oppressive regimes, the U.S. rate exceeds the Cuban rate by about 200 and the Chinese rate by almost 600. It is an understatement to say that the U.S. has an incarceration crisis.

Table 3
Incarceration rates for the U.S. and Select Countries
Number Incarcerated Per 100,000

Country	Incarceration Rate
U.S.	716
Barbados	521
Cuba	520
Russia	475
Turkey	179
United Kingdom	148
China	121
Canada	118
Italy	109
France	98
Germany	79

It is no exaggeration to say that the U.S. has the most racially repressive criminal justice system in the world. The Sentencing Project reports that the U.S. incarcerates its black population at a rate of 4,789 per 100,000. In 2006, there were 836,000 black males in jail or prison out of a total black male population of 18,262,000. That is, about 4.48 percent of the black male population has been incarcerated. According to the Sentencing Project on any given day in the U.S. about ten percent of black males between the ages of 30 and 39 are in jail or prison.

Whereas conventional wisdom would have us believe that this astronomically high black incarceration rate is a function of astronomically high rates of committing crimes, a host of scholars have challenged this perspective, pointing to two factors: the ascension of the most draconian criminal justice laws in U.S. history and a racially biased criminal justice system.

Michelle Alexander, Marc Mauers, the Sentencing Project and others have documented the ascension of these draconian laws, which occurred at both the state and federal levels. They argue that these laws produced the exponential increase in incarceration rates, independent of any changes of crime rates. They note that these laws include mandatory minimum sentences and three-strikes you're out laws. Whereas these laws were enacted to incapacitate violent career criminals, the impact of these laws was to impose excessively high sentences of people for petty and non-violent acts.

The Ewing v California decision illustrates this point. In this decision, Gary Ewing was sentenced to life for stealing three golf clubs. Of course, this was his fourth felony conviction.

In The Celling of America: An Inside Look at the U.S. Prison Industry, Willie Wisely provide many more examples. Joel Murillo, sentenced to 25 years for stealing televisions; Jerry Dewayne Williams, 25 years for stealing a slice of pizza.

A few cases appeared in national news within the past six years include: John Horner was sentenced to 25 years for selling pain pills to help pay for his wife's medical expenses; Hope Sykes was sentenced to 15 to 25 years because she helped her boyfriend sell drugs. The list of

people sentenced to life for petty offenses is endless. The point is that these laws took away the discretion of judges and mandate excessively long minimum sentences for the most petty of offenses. A more recent example of the application of mandatory sentencing laws is the case of Marissa Alexander, who was sentenced to 20 years for firing a warning short when she was assailed by her husband. However, in October 2014 the appeals court remanded the case back to the lower court on grounds that the judge erred in his instructions to the jury.

Michelle Alexander, Mar Mauers and others of provided substantial documentation on racial biases in drug enforcement. In Race to Incarcerate, Mauers reports that about .6 percent of the black population uses crack cocaine, compared to .2 percent of the white population. However, because whites constitutes a significant majority of the population, they constitute 54 percent of the crack. Nevertheless, 81.4 percent of those arrested for crack cocaine related offenses are black. Alexander challenges the conventional wisdom that blacks are more likely to be arrested because they are more visible, as dealers sell crack on street corners in full public view. Alexander demonstrates that white dealers sell drugs in public view in predominantly white areas. However, police target black areas because of the public perception or prejudice that drug dealing is more common in black neighborhoods. Alexander and Mauers conclude that the higher black drug arrests, convictions and sentencing are functions of a racially biased criminal justice system.

Mauers, Alexander and others demonstrate the extent of this racial bias with date from select states. Mauers notes that from 1988 to 1995 in seventeen states there was not one white suspect prosecuted under federal crack cocaine laws. Alexander noted that Georgia has a two-strikes you're out law that mandates life imprisonment for the second drug offense. Under this law 98 percent of those sentenced to life have been black drug offenders (Alexander).

These racial biases spill over into the area of felon disenfranchisement. Felon disenfranchisement laws have disparate racial and class impacts. However, before examining these impacts we need to go back and review the various forms of felon disenfranchisement laws.

Typology of Felon Disenfranchisement Laws

As noted above there is a range of disenfranchisement laws from no disenfranchisement to permanent disenfranchisement. Manza and Uggen's provides the typology above. We add three additional levels to develop the following typology, with seven categories: 1. no Disenfranchisement, 2. only while incarcerated, 3. only while incarcerated and on parole, 4. only after completion of full sentence (payment of fine, completion of parole and probation), 5. after completion of sentence, but after a designated time period, 6. permanent disenfranchisement for select felonies, and 7. Permanent disenfranchisement. Only one state has no disenfranchisement law and that is Vermont. This state allows citizens to vote even while incarcerated. This was Ethan Allen's state, the mountain man and American Revolutionary leader who was the most passionate about democracy. States that disenfranchise citizens only while they are incarcerated automatically restores the right to vote once they are released from prison. These states include: Hawaii, Illinois, Indiana, Maine, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. Maine used to allow incarcerated citizens to vote. It recently disenfranchised the incarcerated. Table 4 below includes four categories of the more restrictive disenfranchisement laws.

All four categories include states that disenfranchise people while in prison. Category I includes the least restrictive states, those that disenfranchise felons after they are release and while they are on probation. Category II includes states that disenfranchise felons throughout the duration of their sentence. Voting rights are restored after completion of parole and probation.

Table 4: Typology of Post-Prison Release Disenfranchisement Categories

I	II	III	IV
disenf only while incar, or on probation,	disenf for length of sentence (prob. Parole, fines)	2-5 year wait or permanent disenfran. for select crimes	Permanant Disenfranchisement
California	Alaska	Alabama	Florida
Colorado	Arkansas	Arizona	Iowa
Connecticut	Georgia	Delaware	Kentucky
New York	Idaho	Mississippi	
	Kansas	Nebraska (2 yr w)	
	Louisiana	Nevada	
	Maryland	Tennessee	
	Minnesota	Virginia (2yr w for nonvio)	
	Missouri	Wyoming	
	New Jersey	Virginia	
	New Mexico		
	North Carolina		
	Oklahoma		
	South Carolina		
	Texas		
	Washington		
	West Virginia		
	Wisconsin		

A number of these states, most notably Arkansas, require felons to pay off all legal responsibilities associated with their conviction, including fines and other legal fees. These financial costs makes the restoration of the right to vote more onerous.

Category III and IV include the most onerous felon disenfranchisement laws. These laws clearly distinguish the United States from other developed democratic nations. These laws are exceptional in terms of the percentage of voting aged populations that are disenfranchised. Category III includes some states that have a waiting period before voting rights can be restored, states that permanently disenfranchised for select offenses, and states that have both. For example, in Arizona, people convicted of one felony can have their voting rights restored upon completion of their entire sentence: parole, probation and payment of all fines and fees. However, people convicted of two or more felonies are permanently disenfranchised, unless they receive a full pardon, which is not likely.

Many of these states including Alabama, Delaware, Mississippi, Nevada and Tennessee permanently disenfranchise ex-felons for only a few select offenses, unless they are pardoned by the judge of governor. In Alabama, most felons can have their voting rights restored after the completion of their sentence, which includes parole, probation and all fines. However, some repeat and serious offenders can be permanently disenfranchised. Mississippi has a list of ten felony and misdemeanor offenses that require permanent disenfranchisement. Nevada laws automatically restores the right to vote to first time felons upon the completion of their terms.

People with multiple felonies are permanently disenfranchised. Tennessee has recently to exempt certain felons from disenfranchisement while permanently disenfranchising others.

Some states have recently reformed their laws, making it easier for felons to regain the right to vote. For example, prior to 2005 Nebraska permanently disenfranchise felons. After the passage of reform laws, a felon can have his right to vote restored two years after the completion of his sentence. Virginia recently replaced it permanent disenfranchisement law for a law that requires a five year waiting period for select violent or drug offenses. Other felons can automatically have their rights restored.

Some states have been involved with political struggles over the rights of ex-felons to vote. In 2005, the Governor of Iowa, Vilsack, issued an executive order restoring the right to vote to felons who had completed their entire sentence (parole, probation and payment of fines and fees). In 2011, Governor Branstad rescinded this order, making Iowa a category IV state that permanently disenfranchised felons.

The Sentencing Project provided an update recent changes in state felon disenfranchisement laws. They are summarized below. As the Sentencing Project's summary of changes indicates, over the past ten years a number of states have made progress in liberalizing their voting regulations for ex-felons.

State	Change (date of change .
Alabama	Streamlined restoration for most persons upon completion sentence (2003).
Connecticut	Restored voting rights to persons on probation (2001); repealed requirement to present proof of restoration in order to register (2006).
Delaware	Repealed lifetime disenfranchisement, replaced with five year waiting period for persons convicted of most offenses (2000). Repealed five-year waiting period for most offenses (2013).
Florida	Simplified clemency process (2004, 2007); adopted requirement for county fail officials to assist with restoration (2006); reversed modifications in clemency process (2011).
Hawaii	Codified data sharing procedures for removal and restoration process (2006).
Iowa	Eliminated (2005) and reinstated (2011) lifetime disenfranchisement; simplified application process (2012)
Kentucky	Simplified restoration process ((2001, 2008), restricted restoration process (2004, amended in 2008)
Louisiana	Required Department of Public Safety and Corrections to provide notification of rights restoration process (2008)
Maryland	Repealed lifetime disenfranchisement (2007)
Nebraska	Repealed lifetime disenfranchisement, replaced with two-year waiting period (2005)
New Jersey	Established procedures requiring state criminal justice agencies to notify persons of their voting rights when released (2010)
New Mexico	Repealed lifetime disenfranchisement (2001), codified data sharing procedures, certificate of completion provided after sentence (2005)
New York	Required criminal justice agencies to provide voting rights information to persons who are again eligible to vote after a felony conviction (2010)
North Carolina	Required state agencies to establish a process whereby individuals will be notified of thir rights (2007)
Rhode Island	Restored voting rights to persons on probation and parole (2006)
South Dakota	Established new procedures to provide training and develop voter education curriculum to protect the voting rights of citizens with certain felony convictions (2010); revoked voting rights for persons on felony probation (2012)
Tennessee	Streamlined restoration process for most persons upon completion of sentence (2006)
Texas	Repealed two-year waiting period to restore rights (1997)
Utah	Clarified sate law pertaining to federal and out-of-state convictions (2006)
Virginia	Required notification of rights (2006); decreased waiting period for non-violent offenses from three years to two and established a 60 day deadline to process voting rights restoration applications (2010) eliminated waiting period and application for non-violent offenses (2013)
Washington	Restored voting rights for persons who exit the criminal justice system but still have outstanding financial obligations (2009)
Wyoming	Restored voting rights to persons convicted of first-time non-violent offenses (2003)

Florida has been on and off the list of states that permanently bar ex-felons from voting. In 2007, Florida's Clemency Board, chaired by former governor Crist, passed a resolution to restore the right to vote to non-violent felons. In 2011, Florida Governor Rick Scott, chaired the board and reversed the 2007 decision. Today, there is a path to restoring voting rights, but it is not open to all ex-felons. Florida ex-felons must wait for five years before they can apply to have their voting rights restored. If they are arrested within the five years, the clock starts over, whether they are innocent or not. After applying for restoration of this right, they would have to wait before the board acts. This wait can take up to seven years. Although technically ex-felons are not permanently disenfranchised in Florida, the difficulties of having these rights restored can be insurmountable. Because of these difficulties, Florida falls into category IV--states for all intents and purposes that permanently disenfranchise a large percentage of ex-felons.

Impacts

The Sentencing Project estimates that about 6 million people are disenfranchised as a result of these laws. About three million ex-felons are disenfranchised. The percentage of the voting aged population disenfranchised because of these laws vary from state to state and are directly related to the level of the restrictiveness of the law. Table 5 presents states with high disenfranchisement rates.

Table 5
Top Ten Disenfranchising States

State	% of voting aged population disenfran.	% of voting age Black pop. Disenf.
Alabama	7.2	15.3
Arizona	4.2	11.2
Florida	10.4	23.3
Georgia	3.8	7.5
Kentucky	7.4	22.3
Mississippi	8.3	13.9
Nevada	4.2	12.6
Tennessee	7.1	18.9
Virginia	7.3	20.4
Wyoming	6.0	18.3

In an age of polarized partisan politics and closely contested elections, decided by slim margins of a couple of percentage point, disenfranchising more than two percent of the population could have a deciding impact on the election. This impact is magnified when those who are disenfranchised favor one party over the other. Since blacks tend to vote Democrat, more than 80 percent in the past two decades, disenfranchising a significant proportion of blacks bias elections in favor of Republican candidates.

A number of studies have indicated that this is precisely the results of partisan disenfranchisement. Moreover,

Constitutional Law

Constitutional law theorists are divided over the issue of the constitutionality of felon disenfranchisement laws. Defenders of these laws have the upper hand, as the U.S. Supreme Court supports them.

Defenders maintain that the constitutionality of these laws is well established. They use the constitution and case law to make their point. They argue that the original constitution delegated the authority to determine the qualifications for voting to the states and that the fourteenth amendment specifically allows for felon disenfranchisement laws. Section 2 of the fourteenth amendment reads:

> Representatives shall be apportioned among the several states according to their respective number…But when the right to vote at any election for the choice of electors for President and Vice president of the United States, Representatives in Congress…is denied to any of the male inhabitants of such state being twenty-one years of age, and a citizen of the United States, or in any way abridged, **except for participation in rebellion, or other crime...**

Defenders insist that the phrase, "except for participation in rebellion, or other crime," allows states to deny the right to vote to citizens who had participated in a crime. Moreover, they point to the Richardson v Ramirez decision. Citing the Ramirez decision, George Brooks summarizes the argument:

> The U.S. Supreme Court reversed, citing the plain language of Section Two of the Fourteenth Amendment, and its historical and judicial interpretation. The Court held that the framers of the Amendment intended to exclude felons from the franchise. After an initial draft was rejected by the Senate, the language, "except for participation in rebellion, or other crime," was not changed despite several debates and proposed revisions. More specifically, although it granted that the legislative history bearing the words "or other crime' was scant, the Court found it consistent with the clear wording of the section. Senator Henderson of Missouri felt that Section Two was an improvement on the earlier draft because disenfranchisement would follow for black and white alike. Likewise, Senator Drake of Missouri had introduced the modifying phrase "under laws equally applicable to all the inhabitants of said State' to the Act readmitting Arkansas so that felon disenfranchisement laws would not be used to disenfranchise blacks. (Brooks 2004, 111).

In Richardson v Ramirez a number of ex-felons who had been released from prison and completed their parole in the state of California sued because California law had denied them the right to vote. They argued that their right to vote was protected by the constitution and that absent a compelling state interest, the state of California could not violate that right. Moreover, because the California law has a disparate impact on minority voters, it violated both the 14th and 15th amendment.

Writing the majority opinion, Chief Justice Rehnquist ruled in favor of the state of California and upheld felon disenfranchisement laws. He argued that the 14th amendment phrase "except for participation in rebellion, or other crime" provided "an affirmative sanction" for

felon disenfranchisement laws. This sanction exempts these laws from strict scrutiny, unless they were enacted with the explicit and expressed intention of denying blacks the right to vote. Rehnquist demonstrated that felon disenfranchisement laws not only predated the 14th amendment, they existed at the time the amendment was proposed and continued to exist after it was ratified.

Defenders point out that the only time the Court disallowed a felon disenfranchisement law was in the Hunter v Underwood (1985) decision. In this decision, the Alabama law that disenfranchised felons convicted for moral turpitude offenses was struck down because this law was passed with the expressed and explicit intention to disenfranchise blacks.

Opponents of felon disenfranchisement laws offer four counter arguments: proof of intent is too high a standard, Rehnquist erred in his reading of the 14th amendment and the intent of its authors; the 15th amendment superseded the 14th amendment; and the Voting Rights Act of 2006 allows disparate impact challenges.

First, opponents argue that the requirement of proof of discriminatory intent or purpose is too high a standard. All that is required for racial discrimination to occur is for policy makers to simply not state their purpose. This problem has been illustrated in the literacy test and poll tax cases. Literacy tests and poll taxes had been used effectively to disenfranchise blacks. Civil rights groups had been unable to prevail in these cases because policy makers had been clever enough not to state that these laws were enacted for the specific purpose of denying blacks the right to vote.

The problem with requiring the showing of "discriminatory intent" rather than only showing "discriminatory effect" in equal protection cases, is further illustrated in a non-voting rights case; United States v. Armstrong (517 U.S. 456). In this case, it was demonstrated that in 1991, every person prosecuted in California's Central District Court, for distribution of crack cocaine, under two federal laws, was black. Rehnquist, once again writing for the majority, restates equal protection standards; specifically, "The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was **motivated by a discriminatory purpose'** (emphasis added)" (465). In his dissent, Justice Steven's notes that although 65% of persons who used crack were white, they represented 4% of those convicted under federal law (479). The majority did not feel that this was sufficient to demonstrate a violation of 14th amendment equal protection. The impact of this decision directly effects felon disenfranchisement. In cases where persons convicted under federal law could be facing a life sentence, a similarly situated individual may serve as little as 5 years, taking into account time off for good behavior. Hunter v. Underwood demonstrates the high standard necessary to show discriminatory intent.

Second, opponents of the Richardson decision disagree with Rehnquist's interpretation of Section 2 of the 14th Amendment and of the intentions of the authors. For example, Jason Morgan-Foster argues that Rehnquist's entire discussion of the actual wording, history and intent of the authors is incorrect. He also challenges law journal articles defending Richardson v Ramirez:

> The article establishes that while the Ramirez Court believed that the words "or other crime' emerged mysteriously from the black box of congressional committee, a review of the legislative history shows they were actually contemplated in open session before entering committee. This is significant, because the whole text of the plenary discussions has been preserved, whereas the Committee discussions have not. Examining these

> plenary discussions, it is clear that the words "or other crime," when taken in their proper context, were meant to refer to crimes of rebellion and disloyalty, particularly treason. By this understanding of the phrase, section 2 of the Fourteenth Amendment only affirmatively sanctions the disenfranchisement of those committing crimes of rebellion or disloyalty to the State, such as treason. With this textual bar removed with respect to most crimes, felon disenfranchisement can thus be examined through means-end constitutional scrutiny, as has become the practice for other first-generation voting rights issues Morgan-Foster 2006, 285).

Morgan-Forster argues that the Republicans in Congress that introduced the 14th Amendment has already disenfranchised leaders of the Confederacy for their rebellion and treason, for attempting to destroy the union and initiating the Civil War which costs hundreds of thousands of lives. Moreover this same congress concerns that Southern states would use felony laws to disenfranchise blacks. He concludes that the correct reading to the Congressional debates Section 2 is that these members of Congress intended to disenfranchise Confederate leaders for their participation in rebellion and other crime and that they also intended to prevent these same Confederate leaders from using criminal laws to disenfranchise blacks.

Third, opponents claim that the 15th Amendment superseded Section 2 of the 14th Amendment. For example, Gabriel Chin argues that these Confederate leaders did precisely what Congressional leaders feared: they engaged in a campaign to disenfranchise newly freed slaves. They used direct violence and law. This assault on black voting rights was so fierce and pervasive that Congress added another amendment, the 15th amendment. Chin maintains that the 15th Amendment repealed Section 2 of the 14th Amendment. He bases this position on the fact that Section 2 recognized the authority of the state over the right to vote. It only penalized states for discriminating against blacks. Unlike the 14th Amendment, the 15th Amendment directly bars state governments from discriminating on the basis of race. Moreover, it explicitly expands federal powers to supersede state powers in order to prevent racial discrimination in voting. Indeed, Section 2 of the 15th Amendment states, "The Congress shall have power to enforce this article by appropriate legislation."

Fourth, opponents of felon disenfranchisement laws argue that the Voting Rights Act of 1982 and 2006 allows for challenges to these laws on the basis of their impacts. The Voting Rights Act of 1982 was enacted in response to the Mobile v Bolden (1980) decision. In this case, the Court ruled that the Voting Rights Act of 1965 did not guarantee the election of blacks and that disparate impacts was not a valid basis to challenge the legality of voting laws. Rather, plaintiffs had to demonstrate that the law was enacted with a deliberate and explicit racially discriminatory intent. In response to this decision Congress enacted the Voting Rights Act of 1982, which required courts to look at the totality of the circumstances when plaintiffs present evidence of racially discriminatory impacts. The totality of circumstances include not just the discriminatory impacts, but evidence of racial polarization in voting and racially charged elections. Lower courts have been divided over whether Section 2 of the Voting Rights Act allowed for a challenge to felon disenfranchisement laws on the basis of the totality of the circumstances. In Farrakhan v Washington (2003), the Ninth Circuit Court stated, "when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 [of the Voting Rights Act] affords disenfranchised felons the means to seek redress." However, other federal appeal courts have claimed that applying the Section 2 of the Voting Rights Act would unconstitutionally alter the balance of power between the states and the

federal government, as the Constitution gives the states the power to determine voting qualification on any basis other than race, gender or age.

Despite the debate between proponents and opponents, as of today, felon disenfranchisement laws have survived and will continue to survive constitutional challenge. Moreover, given the current make-up of the U.S. Supreme Court, it is unlikely that the Voting Rights Act would emerge as a weapon against these laws.

Political Theory

Political theorists are divided over felon disenfranchisement laws. Proponents of these laws insist that they are well grounded in modern liberal democratic theory. These theorists find strong support in enlightenment and social contract philosophers. For example, commenting on early U.S. felon disenfranchisement laws, George Brooks says, "These early laws rested on John Locke's concept that those who break the social contract should not be allowed to participate in the process of making society's rule (Brooks 2004, 104)." Locke argued further that the law of nature was threatened by corrupt and degenerate men. Charles Montesquieu argued for the removal of criminals from society to protect the liberty of individuals. Jean Jacques Rousseau stated that "every offender who attacks the social right becomes through his crimes a rebel and a traitor to his homeland; he ceases to be one of its members by violating its laws, and he even wages war against it (Rousseau 1978, 65)."

Whereas we are hard pressed to find the one political theorist that challenged felon disenfranchisement laws, several theorists provide the basis for a critique. These theorists have contributed to the critical race or radical post-modern literature. They include Derrick Bell, Michelle Alexander, Leon Higgenbotham, David Theo Goldberg, Jurgen Habermas and others.

This literature demonstrates that enlightenment and social contract theorists were infected by gender and racial prejudices common to their times. These prejudices distorted and corrupted their ideas about the dignity and freedom of the individual by defining people who were not Western European men in oppositional terms. Men were rational and women were emotional. White Europeans were civilized and moral, black Africans were savage and immoral. These prejudices retarded the development of ideas of diverse democratic communities, of universal suffrage, and of bilateral communications between the state and diverse political communities.

Rousseau's views of the overly emotional women, unfit for higher education were expressed in his book, Emile. His notions of the noble savage were popularized in his book, Social Contract.

The racial prejudices of theorists such as John Locke, Thomas Jefferson, Immanuel Kant and others are more subtle, but evident in the contradictions of their writings. For example, in his First Treatise on Government, Locke rejects slavery and insists that all men are equal and entitle to natural rights that are ascertainable through reason. In the Second Treatise he insists that slavery is justifiable through just wars. David Goldberg adds this observation of Locke's personal life:

> As secretary to the Carolina Proprietors (South Carolina), Locke played a key role in drafting both that colony's Fundamental Constitution of 1669 and the Instructions to Governor Nicholson of Virginia. The former considered citizens 'to have absolute power over [their] negro slaves', and the latter considered the enslavement of negroes justifiable because prisoners of a just war who had 'forfeited [their] own Life…by some Act that

deserves Death'. Locke considered the slave expeditions of the Royal Africa Company to be just wars in which the 'negroes' captured had forfeited their claim to life.

Locke committed no inconsistency here. Moreover, his view on this point actually reflected widely held European presuppositions about the nature of racial others, and by extension about human subjectivity. First, it is a basic implication of Locke's account that anyone behaving irrationally is to that degree a brute and should be treated as an animal or machine. Hence, rationality is a mark of human subjectivity and so a condition of the necessity to be extended full moral treatment (Goldberg 1994, 27).

Similar prejudices are found in the writings of Immanuel Kant. For example, Goldberg quoted Kant saying, "So fundamental is the difference between [the Negro and White] races of man, and it appears to be as great in regard to mental capacities as in color (Kant 1960, 111 quoted in Goldberg 1994, 32)."

In his early years when he advocated the gradual end to slavery, Thomas Jefferson was committed to the ideas of the equality of all men. However, as he became more supportive of the institution of slavery in his later life, Jefferson came to believe that blacks were intellectually inferior to whites. He expressed these prejudices clearly in his book, Notes on Virginia.

Whereas modern enlightenment theorists saw men as rational and moral, they saw Africans, Native Americans and women as fundamentally and essentially different. They saw blacks and Native Americans as savage and irrational and women as overly emotional, needing protection and ill-suited for politics. These prejudiced perceptions of women and racial minorities obstructed the growth and maturation of modern democratic theory, especially democratic theories that embraced diversity. Indeed, these prejudices have historically been powerful obstacle to the development of support for universal suffrage and the belief of the vote as a human right.

Summary

The 21st century has inaugurated an era of democracy among developed nations. Today, most developed democratic countries sees the vote as a right of citizenship. Many see it as an obligation and responsibility of citizenship. Almost half of European nations allow incarcerated felons to vote. Not one bars ex-felons from voting. In 2005, the European Court of Human Rights declared that voting was a basic human right and that counties that banned felons from voting violated this right. South Africa's Supreme Court recently struck down its laws that banned felons from voting.

Whereas it boasts about its commitment to democracy and voting, whereas it claims that racial prejudice is a problem of the past, the United States of America stands alone in the world as an outlier nation. It has the highest incarceration rate in the world. It incarcerates a larger percentage of its minority population than any other nation in the world. It continues to disenfranchise a significant proportion of its minority population.

Two factors have explained America's contradictions and its penchant to disenfranchise a large proportion of is minority population: the persistence of racial fears and the partisan advantage of denying blacks the right to vote. As this review demonstrates, felon

disenfranchisement laws correlate strongly with racial fears. No doubt these fears correlate strongly with draconian criminal justice laws.

The disenfranchisement of blacks today as it did in the post-Reconstruction era, advantages one party over the other. Today, with blacks voting for candidates of the Democratic Party in record numbers, disenfranchising blacks in record numbers clearly advantages both the Republican Party and conservative policy makers.

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